

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

JOHN E. STROMBECK,)	
)	
Claimant,)	Filed May 9, 2006
)	
v.)	
)	IC 15-000079
THREE RIVERS TIMBER,)	(IC 04-006154)
)	
Employer,)	
)	
and)	ORDER DENYING
)	MOTION TO DISMISS
FREMONT INDUSTRIAL INDEMNITY,)	
)	
Surety,)	
Defendants.)	
_____)	

On December 8, 2005, Fremont Industrial Indemnity (Fremont) filed a Petition for Declaratory Ruling pursuant to Rule 15, Judicial Rules of Practice and Procedure (J.R.P.), regarding Idaho Code § 41-3608(b). John E. Strombeck (Strombeck) filed his Response to the Petition for Declaratory Ruling on December 22, 2005. Strombeck then filed a Memorandum in Support of Response on January 6, 2006. No reply brief was filed by Fremont.

Fremont filed a Motion to Strike on January 18, 2006 requesting the Commission strike Strombeck's response memorandum filed January 6, 2006. Thereafter, Strombeck argued that while there is a deadline for a response, there is no deadline for a response memorandum.

According to J.R.P. 15(E) a response is due within 14 days after the service of the petition. This rule pertains to a response, whether it is in the form of a brief or memorandum or both. Strombeck's response memorandum was filed 29 days after the petition was filed. Therefore, it is untimely and will not be considered. Strombeck's original response filed with the Idaho Industrial Commission on December 22, 2005 is timely and has been duly considered.

As explained below, the Commission is treating the petition for declaratory ruling as a motion to dismiss. A response to a motion to dismiss is also subject to the 14 day timeline, pursuant to J.R.P. 3(E). Thus, Strombeck's response memorandum filed January 6, 2006 is still untimely when viewed as a response to a motion to dismiss.

In the petition for declaratory ruling Fremont contends that Strombeck's claim is barred by Idaho Code § 41-3608(b) due to Strombeck's failure to file a proper complaint by the final date set by a California court for the filing of claims against the liquidator of the insolvent insurer, Fremont Industrial Indemnity Company.

Strombeck argues that Defendants have totally failed to provide any legal or factual authority for denying Strombeck the right to pursue his August 1999 claim and Complaint of May 20, 2004, due to a claims bar date of June 30, 2004 set by a California State Court.

After reviewing the petition and supporting documents, the Commission has determined that the merits of the issue presented are best addressed when viewed as a motion to dismiss. Fremont requests that the Commission declare Strombeck's claim barred due to his failure to timely file a claim against Fremont. If granted, the request would dismiss Strombeck's claim against Fremont.

In the motion, Fremont contends that Strombeck's claim is barred by Idaho Code § 41-3608(b) due to Strombeck's failure to file a proper complaint by the final date set by a California

court for the filing of claims against the liquidator of the insolvent insurer, Fremont Indemnity Company. The Superior Court of the State of California, the County of Los Angeles, issued an Order Appointing Insurance Commissioner as Liquidator and Restraining Orders due to Fremont Indemnity Company's insolvency on July 2, 2003. The order states that all claims must be filed against the insolvent insurer, Fremont Indemnity Company, no later than June 30, 2004.

Even assuming the facts in a light most favorable to Fremont: 1) that the Fremont Indemnity Company named as a party in the referenced California case is the same party as the Fremont in the present case pending before the Idaho Industrial Commission; 2) that the California "Claims Bar Date" of June 30, 2004 is binding on Strombeck's claim; and 3) that Idaho Code § 41-3608(b)(ii) applies the California Claims Bar Date to Strombeck and the facts presented in Fremont's motion, the Commission still finds that Strombeck's claim against Fremont is not barred.

Employer, Three Rivers Timber, had knowledge of Strombeck's claim on May 20, 2004 when Strombeck filed the workers' compensation claim with the Commission, which was well before the California Claims Bar Date of June 30, 2004. Although the May 20, 2004 claim had the incorrect surety listed on the pleading, under Idaho Code § 72-307, knowledge to employer is knowledge to surety. Three Rivers Timber should have known who its surety was and informed them accordingly. So, even though Fremont was first listed as a party of record on December 17, 2004, when Strombeck filed his amended complaint, Three Rivers Timber had knowledge of the claim on May 20, 2004. And because Three Rivers Timber had knowledge, Fremont as surety is deemed to have knowledge as of May 20, 2004 also.

Accordingly, the Industrial Commission hereby denies Fremont's request to declare Strombeck's claim to be barred for his failure to timely file a claim against Fremont.

ORDER DENYING MOTION TO DISMISS- 3

IT IS HEREBY ORDERED that Fremont's motion to dismiss is DENIED.

DATED This __9th__ day of May, 2006.

INDUSTRIAL COMMISSION

_____/s/_____
Thomas E. Limbaugh, Chairman

_____/s/_____
James F. Kile, Commissioner

_____/s/_____
R. D. Maynard, Commissioner

ATTEST:

_____/s/_____
Assistant Commission Secretary

CERTIFICATE OF SERVICE

I hereby certify that on the __9th day of May, 2006, a true and correct copy of the foregoing **Order Denying Motion to Dismiss** was served by regular United States Mail upon each of the following:

GLENNA CHRISTENSEN
P.O. Box 829
Boise, ID 83701

JOHN TAIT
P.O. Drawer E
Lewiston, ID 83501-1944

_____/s/_____